Supreme Court, U. S.
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78-1183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

CARBON FUEL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Fourth Circuit

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CARBON FUEL COMPANY,

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vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA,

Respondents.

Petitioner, Carbon Fuel Company, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) entered in this case on October 31, 1978.

I. OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been published. It is appended to this petition as Appendix A, pp. A1—A10 *infra*. The District Court for the Southern District of West Virginia did not render an opinion.

II. JURISDICTION

The opinion of the Fourth Circuit was announced on September 21, 1978. Petitioner's timely petition for rehearing was denied by order filed October 31, 1978, and this petition was filed within ninety days of that date.

The Court's jurisdiction is involved under 28 USC § 1254(1).

III. QUESTION PRESENTED

When, if ever, may a union be held liable for unauthorized strikes in violation of a collective bargaining agreement because of the Union's failure to take reasonable steps to end or prevent the strikes?

IV. STATUTE INVOLVED

This case involves § 301 of the Labor-Management Relations Act (LMRA), 61 Stat. 156, 29 USC § 185, printed in the Appendix at App. B, B1, 2 *infra*.

V. STATEMENT OF THE CASE

1. INTRODUCTION.

This is an action under § 301 of the LMRA by Carbon Fuel Company (the Employer) against the labor organizations representing its production and maintenance employees (Unions), the International Union, United Mine Workers of America (International), which is the duly recognized collective bargaining agent for the Employer's production and maintenance employees, and its administrative sub-divisions, District 17, United Mine Workers of America (the District) and Local Unions Nos. 6572, 7626 and 2236, United Mine Workers of America (the Locals). The action seeks damages for a series of forty-eight strikes occurring during the years 1969-1973, inclusive, allegedly in violation of the terms of the two collective bargaining agreements between the unions and the employer, the National Bituminous Coal Wage Agreement of 1968 and the National Bituminous Coal Wage Agreement of 1971 (contracts). The contracts, while containing no express "no-strike" clause,

both contain a mandatory grievance and arbitration procedure encompassing all imaginable disputes between the parties together with an express promise "to maintain the integrity of their contract and that all disputes and claims which are not settled by agreement shall be settled by the [grievance] machinery . . . ."[1]

2. PROCEEDINGS IN THE DISTRICT COURT.

The case was tried in March and April, 1976, in the United States District Court for the Southern District of West Virginia (K. K. Hall, Judge), before a jury. The evidence showed, without substantial contradiction, the occurrence of forty-eight separate strikes; and that each was engaged in by all of the members of the unions employed at the involved locations. It further showed that none of the strikes was formally called or authorized by the unions; that the unions had a policy against such strikes, and upon their occurrence tried to persuade and/or direct the strikers to return to work; but, although often threatening to do so, took no disciplinary action or other means which were available to them to end or prevent the strikes. There was substantial evidence that the means employed by the Unions were, and known to them to be, futile. The evidence further showed that thirty-one of the strikes were over disputes between the employer and the union involving the application and interpretation of portions of the contracts dealing with wages, hours and other terms and conditions of employment, and that seventeen of the strikes, while involving a dispute over the extent of the no-strike obligation under the contracts, arose from disputes not between the employer and the unions, but instead from matters out-

[1] These provisions of the 1968 contract were held in *Gateway Coal Co. v. UMWA*, 414 U.S. 368 (1974) to give rise to an implied no strike clause as to strikes over disputes settleable under the grievance and arbitration procedures. *Id.* at 381 and 384.

side the employment relationship, such as internal union disputes, political protests, and sympathy for strikers from other coal operator employers.

At the conclusion of the evidence, the District Court refused the motions of the International and District for a directed verdict based upon their claim that there was insufficient evidence of their liability. It further directed the jury to find that all the strikes were violations of the contracts and that the locals were responsible for those strikes because of the mass actions of their members and officers in engaging in them. The Court submitted the questions of the amounts of damages, and the responsibility of the District and International, to the jury. Its charge relating to International and District liability told the jury that the District and International had a responsibility under the contracts to use all reasonable means available to them to prevent and end strikes in violation of the contracts, and that from such time as they had an opportunity to use such means and failed to do so, they were liable for the strikes.

After extensive deliberations, the jury returned individual verdicts as to each strike, awarding damages against the locals in a total amount of $722,347.43, against the District in the total amount of $242,130.80 and against the International in a total amount of $206,547.80. The verdicts were joint and several, rather than cumulative. The verdicts reflected an obvious determination by the jury under the Court's "all reasonable means" instruction that the District and International were responsible for only some of the strikes, and only a portion of the damages as to those strikes. The Unions' motion to set aside the verdicts and award a new trial was denied, and they appealed.

3. PROCEEDINGS IN THE FOURTH CIRCUIT.

Upon appeal, the Fourth Circuit reversed the judgments as to the seventeen strikes over disputes not arising from the employment relationship as to all of the unions; and affirmed the judgments as to the remaining thirty-one strikes as to the locals. In addition, the Appeals Court reversed all judgments as to the District and International on the grounds that the instruction relating to their duty to use all reasonable means available to them was erroneous, and that the law of the Fourth Circuit with regard to union liability for "wildcat" strikes is as stated in the case of *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, at 877-78 (4th Cir. 1955), cert. denied, 350 U.S. 847 (1955). Quoting from that case, the Court said:

> " 'If [the representatives of UMWA] had done nothing when plaintiff called on them to help get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike. There is no evidence of any sort that they did.' "
> [App. A, pp. A9, 10.]

Upon that holding, the Court further held:

> "In our opinion the present case falls squarely within the four corners of *Haislip*. There was no evidence presented in the district court that either the District or International Union instigated, supported, ratified, or encouraged any of the work stoppages, and under these circumstances it was

> error for the court to deny the motions of these defendants' for directed verdicts."
> [App. A, pp. A10]

It is these holdings which are contested here.

The Employer timely filed a petition for rehearing and suggestion of rehearing en banc. That petition was denied October 31, 1978. On November 13, 1978, the Fourth Circuit stayed its mandate pending application to this Court for a writ of certiorari, and final decision of this Court upon the case. This petition followed.

VI. REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN DIRECT AND ACKNOWLEDGED CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In reaching its holding that if the International and District had "done nothing", they would not have violated the contracts, the Fourth Circuit recognized that its decision was in direct conflict with those of the United States Court of Appeals for the Third Circuit applying identical contract language, in *United States Steel Corp.* v. *UMWA*, 534 F.2d 1063 (3rd Cir. 1976), and *Republic Steel Corp.* v. *UMWA*, 570 F.2d 467 (3rd Cir. 1978), App. A, pp. A7, 8. Since the decision below, the Third Circuit has reaffirmed its holding that the International " 'has a particularly grave responsibility to employ all reasonable means to insure that unlawful [wildcat strike] actions be halted.' " *Bituminous Coal Operators' Association* v. *International Union, UMWA*, 585 F.2d 586, 596 (3rd Cir. 1978), quoting from *Republic Steel, supra*, 570 F.2d at 479.

The Fourth Circuit's holding is likewise in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Wagner Electric Corp.* v. *Local 1104, IUE*, 496 F.2d 954 (8th Cir. 1974), where the Court said: "A union is required to use its best efforts to return striking workers to their jobs if it is not to be held responsible for their actions." *Id.* at 956. On the other hand, the Fourth Circuit's position is supported by the decisions of the United States Court of Appeals for the Sixth Circuit. As noted in the decision below, that Court, in *Southern Ohio Coal* v. *UMWA*, 551 F.2d 695 (6th Cir. 1977) cert. denied, 434 U.S. 876 (1977), refused to hold the International responsible for failure to act to end wildcat strikes.[2] App.A, p. A8.

This conflict between the Circuits is square and irreconcilable. In particular, the Third and Fourth Circuits, interpreting identical language, and in some instances

[2]The positions of the United States Courts of Appeals for the Fifth and Seventh Circuits are not clear. As noted in the opinion below (App.A, pp. A8, 9), the Seventh Circuit in *Old Ben Coal Corp.* v. *Local Union No. 1487 of UMWA*, 457 F.2d 162 (7th Cir. 1972), interpreted the language contained in both agreements in this case which abrogate express "no strike" clauses contained in prior agreements as protecting "the Union from liability for spontaneous or 'wildcat' strikes *which would be the kind of work stoppages subject to the settlement procedures of the agreements.*" 457 F.2d at 165. [Emphasis added] What the Seventh Circuit means by this emphasized language is a mystery. Surely it does not mean that employers may grieve over such strikes, as it is universally recognized that the grievance procedures of the contracts are employee oriented and only the unions or its members may file grievances. At any rate, there is no indication in that decision, or other decisions of the Seventh Circuit, that the Court considered whether there existed an obligation on the International or any of its subdivisions to take affirmative action.

The Fifth Circuit did consider the point in *United States Steel Corp.* v. *UMWA*, 519 F.2d 1249 (5th Cir. 1975). There the Court cited the Third Circuit's decision in *Eazor Express, Inc.* v. *Teamsters*, 520 F.2d 951 (3rd Cir. 1975) cert. denied, 424 U.S. 935 (1976), and apparently adopted its holding requiring the exercise of all reasonable means by a union to avoid liability. *United States Steel Corp.*, 519 F.2d at 1255. Later it apparently limited that application of the doctrine to situations where, as here, there is a pattern of strikes when it said:

> "Furthermore, a series of unauthorized strikes should put the union on notice, and as suggested, raise the level of effort required to exculpate themselves from liability." [519 F.2d at 1256]

However, upon rehearing, the Court appeared to direct the lower court upon remand to decide whether to adopt the doctrine. *United States Steel Corp.* v. *UMWA*, 526 F.2d 377, 378 (5th Cir. 1976).

identical contracts, have reached diametrically opposite results. The issue is very much alive as the present National Bituminous Coal Wage Agreement of 1978 contains the same language. None of the conflicting decisions have been superseded, or have lost any weight by reason of subsequent decisions.

Moreover, this case is perfectly suited for resolution of the conflict. The issue has been fully tried in the District Court, with the issue raised and decided on motion to dismiss the complaint, and motion for directed verdict and judgment notwithstanding the verdict. The District Court either received or permitted by avowal testimony all evidence which the parties wished to introduce relating to the issue. No issue as to the refusal of testimony on this issue was raised on appeal in the Fourth Circuit. The Fourth Circuit clearly and unequivocally decided the issue. Its resolution is essential to the outcome of the case, in that a resolution of the question would necessarily either result in reinstatement of the judgment upon the jury's verdicts against the International and District or affirmance of the Fourth Circuit direction that the International and District be dismissed.

In short, the conflict between decisions of the various circuits justifies the grant of certiorari to review the judgment below.

2. THE ISSUE OF THE OBLIGATION OF A UNION WITH REGARD TO UNAUTHORIZED STRIKES BY ITS MEMBERS IN VIOLATION OF COLLECTIVE BARGAINING CONTRACTS IS AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The importance of the question presented is so obvious

as to require little argument. It deals with the effectiveness of the process of collective bargaining in achieving the chief objective of the nation's labor laws—the maintenance of industrial peace.

As this Court pointed out in another context in *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, at 103-04 (1962), (citations omitted):

> "More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.
>
> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling."

The effect of the present lack of uniformity is just the

sort of substantial uncertainty, with its resulting unhappy consequences, described in *Lucas Flour*.

That effect is best demonstrated by the case of *Bituminous Coal Operators' Association* v. *International Union, U.M.W.A. supra.* In that case, Bitumnious Coal Operators' Association (BCOA), the employers' association representing operators in collective bargaining with the International, filed a suit in the United States District Court for the Western District of Pennsylvania seeking a declaration interpreting the language here in issue and an injunction against the International enforcing its alleged obligations to prevent and end unauthorized strikes by its members at the operations of operator members of BCOA. In a companion case, *Consolidation Coal Co., et al.* v. *International Union, U.M.W.A.*, 431 F.Supp. 787 (W.D. Pa. 1977), individual operator members of BCOA who had operations in the Third and other Circuits sought similar relief. The District Court dismissed the complaint of BCOA for, among other reasons, that its members have operations in other circuits where the availability of relief is "quite different". *Bituminous Coal Operators Association* v. *International Union, U.M.W.A.*, 431 F.Supp. 774, 784 (W.D. Pa. 1977). The individual operators' case was dismissed as to the claim for injunctive relief upon the same grounds. *Consolidation Coal Co.* v. *International Union, U.M.W.A.*, 431 F.Supp. at 791-92. Upon consolidated appeals, the Third Circuit reversed the dismissals and remanded the cases for a determination as to the declaratory relief sought by BCOA and the injunctive relief and damages sought by the individual operators. *Bituminous Coal Operators' Association* v. *International Union, U.M.W.A.*, 585 F.2d (3rd Cir. 1978). In so doing, the Court of Appeals acknowledged the fact that some operations of the operator plaintiffs are in different

circuits which have different views as to this issue and that this fact raised a difficulty which "might, in the end, be a reason for denying some of the requested relief". However, the Court held that this difficulty was not "a reason for refusing to hear the case." *Id.* at 592. Moreover, the Court suggested that as Republic Steel Corporation was a signatory to the 1974 National Bituminous Coal Wage Agreement, the holding which it obtained in *Republic Steel Corporation* v. *U.M.W.A., supra,* "can be relied upon not only by the Republic Steel Corporation but also by other signatories to the same contract, since the International is collaterally estopped on the issues actually litigated and determined against it." *Bituminous Coal Operators' Association,* 585 F.2d at 596. No mention is made of the potential collateral estoppel effort of contrary decisions involving other signatories, such as the Employer here, in other circuits.

The District Court, upon remand of those cases, has a difficult, if not impossible job. That difficulty occurs not from the lack of clarity of the law in the Third Circuit, but instead from issues of comity and collateral estoppel between different circuits, reaching different results in interpreting identical language in collective bargaining agreements between identical parties or their privies in contract. That same difficulty is shared by the parties to the contract, which is applied in one way in one geographical location, and another in a different one.

So far as research has determined, this Court has not decided the issue here involved. Because of its obvious importance, and the obvious ill effects of differing decisions as to it upon the administration of National Labor Policy, certiorari should be granted in this case to resolve the conflict.

3. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES ENUNCIATED IN THE DECISIONS OF THIS COURT IN FASHIONING SUBSTANTIVE FEDERAL LABOR LAW FROM THE POLICY OF OUR NATIONAL LABOR LAWS.

In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), at page 456, this Court held that: "the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws." As held in that case, the primary concern of Congress in enacting § 301 was: "that unions as well as employers should be bound to collective bargaining agreements . . . [and] that there be a procedure for making such agreements enforceable in the Courts . . . ." *Id.* at 453. This purpose is readily deducible from the Senate Report on the Act. quoted in *Lincoln Mills, supra*, at 454:

> " 'If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> 'Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.' "

The decision by the Lower Court negates this policy. If a union, such as the International, can sign a collective bargaining agreement promising to refrain from striking over issues arbitrable under that agreement; delegate the performance of that promise to its judgment proof locals; and then, with impunity, do nothing when those locals repeatedly and flagrantly violates the promise, then the agreement is illusory, and the policy of our national labor laws to promote industrial peace through the execution and enforcement of agreements, is defeated.

VIII. CONCLUSION

For all the reasons above asserted, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1422

CARBON FUEL COMPANY,

v. *Appellee,*

UNITED MINE WORKERS OF AMERICA:
DISTRICT No. 17,
United Mine Workers of America;
LOCAL UNION No. 6572,
United Mine Workers of America;
LOCAL UNION No. 7626,
United Mine Workers of America; and
LOCAL UNION No. 2236,
United Mine Workers of America,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON.
K. K. HALL, DISTRICT JUDGE.

Argued: December 7, 1977 Decided: September 21, 1978

Before HAYNSWORTH, Chief Judge; BUTZNER, Circuit Judge, and FIELD, Senior Circuit Judge.

FIELD, Senior Circuit Judge:

Carbon Fuel Company filed an action under Section 301 of the Labor-Management Relations Act of 1947, as

amended, 29 U.S.C. §185, against three local unions of the United Mine Workers of America (UMWA)[1], UMWA District 17, and the International Union, seeking injunctive relief and damages incident to forty-eight work stoppages which occurred during the years 1969 through 1973 at various mines of Carbon Fuel in southern West Virginia. Carbon Fuel and UMWA were parties to a collective bargaining contract known as the "National Bituminous Coal Wage Agreement of 1971", which contract became effective on November 12, 1971, but which expired prior to the trial of this case, leaving only the question of damages to be tried. The issues at trial were whether the alleged stoppages had occurred, whether they were actionable, and the damages allocable to each actionable stoppage. Under the agreed procedure, the jury considered the evidence and returned a separate verdict for each stoppage. Verdicts were returned by the jury aggregating $206,547.80 against the International Union, $242,130.80 against District 17, and $722,347.43 against the three local Unions. Judgments were entered pursuant to the verdicts with respect to each stoppage, and all of the UMWA defendants have appealed.

The case came on for trial after our decision in *Armco Steel Corp.* v. *UMWA*, 505 F.2d 1129, *cert. denied* 423 U.S. 877 (1975), but prior to the Supreme Court's decision in *Buffalo Forge* v. *Steel Workers*, 428 U.S. 397 (1976), and was tried and evidence presented on the basis of *Armco*. The district court, relying upon *Armco*, ruled as a matter of law that each of the stoppages was violative of the collective bargaining agreement. Seventeen of the forty-eight stoppages were "sympathy

[1]The local unions named as defendants were Nos. 6572, 7626, and 2236.

strikes",[2] and Carbon Fuel now concedes that in the light of *Buffalo Forge* it was error for the court to direct the jury that these seventeen stoppages violated the collective bargaining agreement. Despite this concession, however, Carbon Fuel contends that its judgments with respect to these stoppages should not be vacated and dismissed, but rather that they should be remanded to the district court with directions that they be referred to arbitration upon the issue of whether the action of the UMWA members in refusing to cross picketlines or in engaging in the various work stoppages violated the collective bargaining agreement. Carbon Fuel suggests that upon receipt of the arbitrators' decision the district court can then either reinstate or finally vacate the judgments as to these stoppages.

In our opinion, the answer to this contention of Carbon Fuel is found in *Buffalo Forge* itself. In that case the arbitrability of the question of whether the production employees were required to cross the picketline was conceded, 428 U.S., *supra,* at 410, due to the fact that the agreement contained an express no-strike clause. The Court made it clear, however, that in the absence of such a clause, a sympathy strike is neither actionable nor arbitrable:

> "The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of its bargain. *Thus, had the contract not contained a no-strike clause or had the clause expressly excluded sympathy strikes, there would have been no possible basis for implying from the existence of*

[2]None of these stoppages was in support of any "sister unions", but they did qualify as "sympathy strikes" under *Buffalo Forge* since they were not the result of any dispute between the Union and the company. The reasons for these stoppages ranged from political protests to intraunion disputes.

> *an arbitration clause a promise not to strike that could have been violated by the sympathy strike in this case.*" (Emphasis supplied).

428 U.S., *supra*, at 408. This statement of the Court is clarified by its observation in footnote 10, *Id*, that the courts of appeals, including our court in *Armco*, who had "assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes," were wrong.

Our conclusion on this point is in accord with decisions of the Third and Sixth Circuits. In *United States Steel Corp.* v. *United Mine Workers*, 548 F.2d 67 (3 Cir. 1976), the court stated:

> "Had the contract in the instant case contained a no-strike clause, the issue whether the sympathy strike violated the union's no-strike undertaking might have been arbitrable. In the absence of a no-strike clause, however, *Buffalo Forge* establishes that there is 'no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike' in this case.

Id. at 73. The court further observed that "[w]hat *Buffalo Forge* establishes regarding the arbitrability of sympathy strikes is as applicable to this particular suit for monetary damages as it is to a request for injunctive relief." *Id.* at 72. Similarly, in *Southern Ohio Coal Co.* v. *U. M. Wkrs. of America*, 551 F.2d 695 (6 Cir. 1977), the court found that the absence of a no-strike clause was fatal to the company's claim of arbitrability, stating:

> "The Bituminous Coal Wage Agreement of 1974 does not contain an express no-strike clause so the issue of the union's right to refuse to cross a picketline is not even arguably arbitrable."

Id. at 705.

We do not find our recent decision in *Cedar Coal Co.* v. *United Mine Wkrs. of America*, 560 F.2d 1153 (1977), at odds with our conclusion on this point. In *Cedar Coal* we recognized that there was a question as to whether the object of the strike was to compel the company to concede an arbitrable issue and address ourselves only to the denial of injunctive relief pending arbitration. Upon the record before us we discern no such issue in the present case and, accordingly, the judgments based upon these seventeen stoppages are reversed.

The remaining thirty-one work stoppages were concededly precipitated by disputes between members of the UMWA and Carbon Fuel which were subject to the arbitration provisions of the collective bargaining agreement. However, all of these stoppages were properly characterized as wildcat strikes and, accordingly, it is necessary to consider the responsibility, if any, of the several defendants for the resultant damages. The district court directed verdicts of liability against the Locals for the majority of these strikes on the basis of the "mass action" theory of responsibility. The genesis of this theory is generally attributed to Judge Goldsborough's decision in *United States* v. *International Union, U.M.W. of A.*, 77 F.Supp. 563 (D.C. 1948), where he stated "that as long as a union is functioning as a union it must be held responsible for the mass action of its members." *Id.* at 566. Over the years this theory of responsibility has been refined and applied by a number of courts,[3] and its rationale was recently stated by the Third Circuit in *Eazor Exp., Inc.* v. *International Bro. of Team.*, 520 F.2d 951 (1975), as follows:

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[3] *See e. g. Vulcan Materials Co.* v. *United Steelworkers of America*, 430 F.2d 446 (5 Cir. 1970); *United Textile Workers* v. *Newberry Mills, Inc.*, 238 F.Supp. 366 (W.D. S.C. 1965).

> "When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union, as happened here, many courts hold the union responsible on the theory that mass action by union members must realistically be regarded as union action. The premise is that large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members."

Id. at 963. However, responsibility for wildcat strikes under this theory will ordinarily be limited to the local union. This was recognized in *U. S. Steel Corp.* v. *United Mine Workers of America*, 534 F.2d 1063 (3 Cir. 1976):

> "Consistent with theory, however, the liability must be limited to the entity whose membership acts in concert. In most cases, as here, that entity will be the local union. Thus absent a showing of complicity on the part of a larger union entity —the District or International Union, for example —only the local can be held liable under the mass action theory."

Id. at 1074.

In our opinion the "mass action" theory, properly applied, represents a sensible and pragmatic approach to this difficult problem in the area of labor relations. In view of the uncontradicted evidence that all of the members of the defendant Locals, including their officers, participated in the strikes, the theory was properly employed by the district court in placing responsibility upon the Locals. Accordingly, the judgments against the Locals growing out of these thirty-one work stoppages are affirmed.

In regard to District 17 and the International Union, the district court charged the jury that these defendants had the duty and responsibility to use all reasonable

means to prevent or terminate the wildcat strikes, and that the failure to do so would render them liable for the work stoppages. The court further instructed the jury that the District and International could be held liable if the jury found that the Locals were acting within the scope of their authority as agents of the District and International. The defendants contend that these instructions ignored the history of the collective bargaining agreement and misconstrued its terms. Additionally, they urge that in giving such instructions the district court failed to follow the controlling precedent in this circuit, *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872 (4 Cir. 1955).

The bargaining history which was chronicled in *International U., U.M.W. of A.* v. *National Lab. Bd.*, 257 F.2d 211 (D.C. Cir. 1958), discloses that as late as 1941, the contract contained an express agreement not to strike. However, following the passage of the Taft-Hartley Act, 29 U.S.C. § 141, *et seq.*, the 1947 agreement rescinded all "no-strike", "penalty", and "illegal suspension of work" clauses which had been contained in earlier agreements. The reason for this was to protect the union from potential law suits under Taft-Hartley. Thereafter, during the brief period from 1950 to 1952 the contract contained an express clause which required the Union to exercise its "best efforts" to prevent work stoppages. However, that provision was eliminated two years later. The bargaining history shows that the agreements from 1972 through 1977 neither imposed any "best efforts" duties on the International nor did they contain any indemnity obligation which would make the International vicariously liable for local wildcat stoppages. In instructing the jury in this fashion, the district court apparently followed *Eazor Exp., Inc.* v. *International Bro. of Team., supra*, 520 F.2d 951, and *U. S. Steel* v. *United Mine Workers*,

supra, 534 F.2d 1063. In the latter case the Third Circuit stated that "[a] covenant to maintain the integrity of the contract necessarily embraces a reasonable efforts obligation to comply with the [implied] no-strike promise." *Id.*, at 1073. In all deference, we cannot agree with this conclusion. In the light of the bargaining history, it appears to us that such an interpretation, in effect, rewrites the terms of the contract upon which the parties had agreed.[4]

The rationale of the Third Circuit in *Eazor* has not been generally accepted. In *Southern Ohio Coal* v. *U. M. Wkrs., supra*, 551 F.2d 695, the Sixth Circuit declined to follow *Eazor*, stating that "there is no authority in this circuit for the proposition that a union may be held responsible * * * for failure to use its 'best efforts' in curtailing [unauthorized strikes]. On the contrary this Court has repeatedly held that a union may only be held responsible for the authorized or ratified actions of its officers and agents." *Id.*, at 701. Similarly, in *Old Ben Coal Corp.* v. *Local U. No.* 1487 *of United Mine Wkrs.*, 457 F.2d 162 (1972), the Seventh Circuit referred to the bargaining history and stated:

> "Implying a no-strike obligation in the 1968 agreement does not render the express abrogation of previous no-strike clauses meaningless as then Circuit Judge Stewart indicated in [*Lewis* v. *Benedict Coal Corporation*, 259 F.2d 346 (6 Cir. 1958)]. By virtue of that language, the Union has preserved the right to strike with respect to all disputes not subject to settlement by other methods made exclusive by the agreement. *In addition the language protects the Union from liability for spontaneous or 'wildcat' strikes which would be the kind of work stoppages subject to the settlement procedures of the agreement.*" (Emphasis Supplied).

[4]We also decline to follow the rationale applied in the recent case of *Republic Steel Corp.* v. *U.M.W. of America*, 570 F.2d 467 (3 Cir. 1978).

Id at 164.

The position of the Sixth and Seventh Circuits accords with our decision in *Haislip* which has been described as "a major case in this area."[5]. In *Haislip* Judge Parker stated the law of this circuit clearly and unequivocally:

> "What we are dealing with is, not a case where circumstantial evidence points to instigation of a strike by defendants or the agents who represented them, but a 'wild cat' strike of local origin, without anything to suggest that defendants or their agents had anything to do with bringing it about. [The representatives of UMWA] were called in to try to end the strike and get the men to go back to work, and everything that they did was directed to that end. Even if the testimony as to their advising the men to go back to work be disregarded and it be assumed that they did nothing of the sort, there is no evidence to support the view that they adopted the strike, that they encouraged it or that they prolonged it.
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> * * * * * * * *
>
> There is nothing in the contract making defendants liable for 'wild cat' strikes or requiring that they take any action with regard to them. This court has pointed out that employees who engage in 'wild cat' strikes lose the protection of the Fair Labor Standards Act and may be discharged by their employers with inpunity for so doing. *N.L.R.B.* v. *Draper Corporation*, 4 Cir. 145 F.2d 199, 156 A.L.R. 989. We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability. If [the representatives of UMWA]

[5]*United States Steel Corp.* v. *United Mine Wkrs. of A.*, 519 F.2d 1249, 1253 (5 Cir. 1975).

had done nothing when plaintiff called on them to help get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike. There is no evidence of any sort that they did."

223 F.2d 872, 877-878.

In our opinion the present case falls squarely within the four corners of *Haislip*. There was no evidence presented in the district court that either the District or International Union instigated, supported, ratified, or encouraged any of the work stoppages, and under these circumstances it was error for the court to deny the motions of these defendants' for directed verdicts.

We have carefully considered the other issues raised on this appeal, and are of the opinion that the district court's conduct of the trial, including its evidentiary rulings and modified "Allen charge", fell well within the acceptable limits of judicial discretion. Accordingly, the judgments against District 17 and the International Union are vacated and remanded with directions to dismiss as to these defendants. The judgments against the Locals on the seventeen sympathy stoppages are also vacated. The remaining thirty-one judgments against the Locals are affirmed.

AFFIRMED in part;
VACATED and
REMANDED in part.

APPENDIX B

STATUTE INVOLVED

§ 185. Suits by and against labor organizations
Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers

or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.